No. 14,877

United States Court of Appeals

For the Ninth Circuit

HAROLD D. PADDOCK,
Appellant,

vs.

FLORENCE PADDOCK,
Appellee.

BRIEF OF APPELLANT.

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I.

JURISDICTION.

The jurisdiction of the District Court was invoked under the act of June 6, 1900, C. 786, Section 4, 31 Statutes 322, as amended, 48 U.S.C.A., Section 101. The jurisdiction of the Court of Appeals rests on Section 1291, of the new Federal Judicial Code, and Fedderal Rules of Civil Procedure.

II.

JUDGMENT BELOW.

A judgment was entered in the District Court at Anchorage, Alaska, on the 22nd day of December, 1954

(TR 31), based upon Findings of Fact and Conclusions of Law, filed on the same day, which resulted from a trial held exactly one year earlier, namely on December 22, 1953.

III.

STATEMENT OF FACTS.

In the year 1936, the Appellee herein, Florence Paddock, went to work for the Appellant, Harold Paddock, answering the telephone in his paint store business in Anchorage, Alaska. (TR 97.) The Appellee had two small children of approximately one and three years of age. She was caring for her children alone, with no mention appearing in the record as to the reason why the Appellee's former husband was not assisting in the support of his children.

This employee-employer relationship between Appellee and Appellant continued for a period of something less than two years, when it was ended by the marriage of the Appellee and the Appellant, in January of 1938. (TR 3.) The Appellee entered the marriage with little or no money of her own (TR 106), and also brought the added liability of two small children of her own who, at the time of the marriage, were approximately three and four years of age. (TR 74.)

The Appellant proceeded to make a home for the Appellee and her two small children, and did, over the years, succeed in establishing a nice home for his family. (TR 121.) The two children were never adopted by the Appellant, but were raised, supported

and schooled by the Appellant, with the children even using his name. (TR 141.)

At the time of the marriage, in 1938, the Appellant owned the business known as Paddock's Paint Store, which, along with the value of the real property and other property of the Appellant, gave the Appellant an estimated net worth of Fifteen Thousand Dollars ($15,000.00) to Twenty Thousand Dollars ($20,000.00). (TR 129.) This was in 1938. The net worth of the business alone had increased to Eighty-nine Thousand Two Hundred Sixty-four Dollars and Sixty-nine Cents ($89,264.69) of the approximate time that the divorce action brought herein was tried. (TR 42.)

There were no children born to this marriage and the Appellant and Appellee continued to live together until October of 1952, when they separated. (TR 25.) On July 23, 1953, the Appellee filed her complaint for divorce, alleging incompatibility. (TR 3.) The Appellant filed an answer and counter-claim on November 20, 1953, asking for a divorce on the grounds of incompatibility and alleging misconduct on the part of the Appellee. (TR 5.) On the same date, namely November 20, 1953, the Appellant filed a motion for temporary restraining order and for order to show cause, and an affidavit in support of the motion and the order to show cause and temporary restraining order. (TR 8-11.) The order to show cause and temporary restraining order was signed by the judge of the District Court. On November 24, 1953, the Appellee filed her answer to the counter-claim, denying any misconduct on her part. (TR 12.) On December 22,

1953, the case came on for trial before the Honorable J. L. McCarrey, Jr., District Judge for the Third Division of Alaska. During the course of the proceedings in this case, the Court appointed a Master to make an accounting of the property of the Appellant and Appellee. (TR 72.) Arrangements were also made for other accountants to determine the values of the properties involved herein and reports were submitted to the Court by accountants George R. Jones and W. P. Odom of Anchorage. (TR 41-51.) On October 8, 1954, the District Court filed a memorandum opinion wherein appraisers were instructed to deduct from the plaintiff's, Mrs. Paddock's, interest in and to the business of the Appellant the sum of Thirty Thousand Dollars ($30,000.00). (TR 21.) Then on December 22, 1954, exactly one year after the trial of the action herein, the District Court filed Findings of Fact and Conclusions of Law and a Decree in this case. (TR 23-36.) By the Decree, the Appellee, Florence Paddock, was awarded the family home and furnishings. This home was appraised by one of Appellee's own witnesses at the value of Eighteen Thousand Five Hundred Dollars ($18,500.00) to Twenty Thousand Dollars ($20,000.00) for the building and land (TR 121), and with the furnishings appraised at from Two Thousand Dollars ($2,000.00) to Two Thousand Five Hundred Dollars ($2,500.00). (TR 122.) This appraisal would give a minimum valuation of Twenty Thousand Five Hundred Dollars ($20,500.00) for the house, land and furnishings by the addition of the two lowest estimates. The Decree awarded the home to the Appellee upon a valuation of Twenty Thousand Dol-

lars ($20,000.00) and allowed the Appellant the sum of Ten Thousand Dollars ($10,000.00) for the value of his business at the time that he married the Appellee. Thus, under the terms of the Decree, the Appellant would be allowed Thirty Thousand Dollars ($30,000.00) to offset the value of the house and the valuation of his business, and the rest of the property would be split equally except for the individual drawings of the parties during the year.

The split of the property ordered by the Court appears to be an attempt to make a straight partnership split of the property after allowing the Appellant the sum of Ten Thousand Dollars ($10,000.00), which was the valuation of his business at the time that he married the Appellee, which said valuation was given by the District Court. The Court also indicated in its Findings of Fact as follows:

> "V. That prior to the marriage of the parties, the defendant Harold D. Paddock was operating a certain business and had an investment at that time in such business in the amount of $10,000.00." (TR 25.)

No allowance was made for any increase in value due to the natural appreciation, although the Court had indicated that he would do so. (TR 131.)

In the accountings, consideration was given to the drawings of the parties, which amounted to Sixteen Thousand Five Hundred Twenty Dollars and Twenty-seven Cents ($16,520.27), for Mrs. Paddock in 1953, and One Thousand Six Hundred Forty-five Dollars and Forty-seven Cents ($1,645.47) for Appellant.

(TR 46, 93.) It was admitted that Thirteen Thousand Dollars ($13,000.00) was drawn by Mrs. Paddock in cash. (TR 170.) But no explanation was given as to why she needed so much money and still ended up the year owing approximately Two Thousand Dollars ($2,000.00) (TR 171), when her home was paid for.

After the trial of the case, the Appellant, through substituted attorneys, filed a Motion to Reopen the Case and to Set Aside All Previous Orders Made. This was filed on January 26, 1954, argued on June 25, 1954, and denied on July 28, 1954. After Findings and Decree were filed, the Appellant duly filed a Motion for a new trial. This Motion was denied on June 24, 1955, and a Notice of Appeal filed on July 5, 1955, with an Amended Notice of Appeal filed on July 14, 1955.

IV.

SUMMARY OF ARGUMENT.

A.

The opinion of the Court, the Findings of Fact and Conclusions of Law and the Decree were signed prior to the defendant having rested his case, and this matter was called to the attention of the Court by a Motion to re-open the case and to set aside all previous orders, and this Motion was erroneously overruled.

The Court was specifically requested to set aside its opinion, Findings of Fact and Conclusions of Law and the Decree, for the reason that they are premature, inequitable, unjust, unreasonable and oppressive as

against the defendant, Harold D. Paddock, the Appellant here. (Points 1 and 2.)

B.

That the opinion, Findings of Fact and Conclusions of Law and Decree are based upon a theory of partnership in the business known as Paddock's Paint and Furniture Store, when in truth and in fact, there was no partnership and no proof of partnership, that the property all belonged to Harold D. Paddock before he married the plaintiff, and continued to belong to him at all times, and that the oral finding of the Court that there was a partnership between the parties is not supported by any evidence; is against the clear weight of the evidence, and is against the laws of the Territory of Alaska. (Point 3.)

C.

That the Court erred further in that the Findings of Fact and Conclusions of Law conflict with the Opinion filed October 8, 1954, and therefore the Findings of Fact and Conclusions of Law were evidently signed by inadvertence and mistake, and it was error on the part of the trial court to refuse to set them aside and correct them. (Point 4.)

D.

The Court erred in finding in its opinion on page 2 thereof, that both plaintiff and defendant devoted their full time in the development of the business, because there is no substantial evidence to that effect, and

there is plenty of competent evidence against such a finding, and that such finding is contrary to the greater weight of the evidence and not supported by any evidence.

That the Court further erred in finding that each party is entitled to one-half of the real and personal property, because the finding is contrary to law, contrary to the evidence, contrary to equity and justice, and against the greater weight of the evidence. (Points 5 and 6.)

E.

The Court erred further in finding that the defendant's investment in the business prior to the time plaintiff married him was $10,000.00, when the undisputed evidence showed a greater amount, and this finding should have been to the effect that the defendant owned Lot Two (2) and the East one foot of Lot Three (3) in Block 39, in the original Townsite of Anchorage, Alaska, and also owned the property across the street therefrom, known as the Sunshine Market, prior to his marriage to the plaintiff, as all of the evidence shows that fact to be true.

The Court erred in not giving this real property last above described to the defendant free and clear of any claim of the plaintiff. (Points 7 and 8.)

The Court further erred in its opinion filed October 8, 1954, giving the plaintiff $700.00 a month salary for working in the furniture store for the entire year of 1953, when the evidence showed she did not work there during that period at any time. (Point 9.)

G.

The Court erred in that after it ordered three appraisers to be chosen and a decision and appraisal reached, which decision and appraisal would be final, and before this decision was reached, the court signed the purported Findings of Fact and Conclusions of Law and Decree, over the objections of the defendant. (Point 10.)

H.

The Court further erred in its finding that the plaintiff is entitled to receive from the defendant $500.00 per month for temporary support from January, 1954 until October 31, 1954, this being inequitable and unfair, due to the other findings in the opinion and the testimony before the court. (Point 11.)

I.

The Court erred in making Findings of Fact No. 7, for the reason that the same is inequitable, not supported by competent evidence, and is based upon the theory of partnership existing between the plaintiff and the defendant and is contrary to good conscience, law and equity. (Point 12.)

J.

The Court erred in making Finding of Fact 8, for the reason that the same is against the evidence in the case, is inequitable, unfair and clearly against the law in this case.

The Court erred in making Conclusion of Law No. 5, for the reason it is contrary to law, contrary to equity and good conscience.

The Court erred in making Conclusion of Law No. 6, on the last page thereof, for the reason there is no evidence to support such a Conclusion of Law, no finding of fact based upon any competent evidence to give the court any reason to make such a Conclusion of Law.

The Court erred in making Conclusion of Law found in Paragraph 3 of the Decree; that the same is erroneous, is against the Laws of the Territory of Alaska, and contrary to all equity in the matter.

The Court erred in rendering and signing a decree based upon the erroneous findings of fact and Conclusions of Law. (Points 13, 14, 15, 16, and 17.)

V.

ARGUMENT.

A. 1. THE OPINION OF THE COURT, THE FINDINGS OF FACT AND CONCLUSIONS OF LAW AND THE DECREE WERE SIGNED PRIOR TO THE DEFENDANT HAVING RESTED HIS CASE, AND THIS MATTER WAS CALLED TO THE ATTENTION OF THE COURT BY A MOTION TO REOPEN THE CASE AND TO SET ASIDE ALL PREVIOUS ORDERS, AND THIS MOTION WAS ERRONEOUSLY OVERRULED.

2. THE COURT WAS SPECIFICALLY REQUESTED TO SET ASIDE ITS OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND THE DECREE, FOR THE REASON THAT THEY ARE PREMATURE, INEQUITABLE, UNJUST, UNREASONABLE AND OPPRESSIVE AS AGAINST THE DEFENDANT, HAROLD D. PADDOCK, THE APPELLANT HERE. (Points 1 and 2.)

The trial of this case on December 22, 1953, was handled for the Appellant by Mr. Wendell Kay, of Anchorage. At the end of the trial, there was an understanding that Mr. Kay would present a Brief because of certain issues of law that had not been cleared up during the trial. (TR 175-176.) The brief was never written and presented by Mr. Kay, and shortly after that, the Appellant substituted other attorneys for Mr. Kay. Then, before any further action had been taken by any of the parties or the Court, Appellant's attorneys filed a Motion to Reopen the Case and to Set Aside All Previous Orders Made, on the 25th day of January, 1954. (TR 15.)

This motion to reopen the case, etc. offered additional evidence to the Court of the Appellee's misconduct. (TR 15.) In addition to the misconduct of the Appellee, the Appellant also offered to show the Court the true value of all the property belonging to

the defendant. This particular item was an extremely important one, since most of the difficulty of this case has resulted from the unfair distribution of the property to the Appellee without allowing the Appellant the proper allowances for his hard-earned savings and work prior to marrying the Appellee. In addition to the question concerning the property, the Appellant also offered to show that there was never any semblance of partnership between the parties. This, too, was an extremely important point, since it appeared that the Court based his opinion, at least in part, upon a finding that a partnership existed between Appellant and the Appellee. The Appellant also offered to show that the Appellee had done little to advance the business, and in fact had been detrimental to the operation of his store. Another point that the Appellant offered to make was to show the Court the actual value of the properties that Appellant owned prior to his marriage to the Appellee. This, too, was an extremely important point, since the Court had indicated to Appellant's counsel that he would take into consideration the increase in value of the property, but when it came to the awarding of the property, the Court completely failed in this respect. That the Court intended to take into consideration the increase in value of the property is borne out by the following discussion at Page 131 of the transcript:

> "Mr. Kay. It seems to me it is important in this respect: To bring out the chronology of the acquisition of this property. From my point of view, I would like to show that it was actually acquired by Mr. Paddock very early in the mar-

riage, either before or at the time of it, or a year or so after the marriage. Now surely we are not going to—I don't wish to debate the point, but the point to me is what has happened since then has largely been, at least as far as the increase in value of this property, has just been normal increase of all property in the Anchorage area by reason of the growth of the area.

Court. Wouldn't the Court take that into consideration?"

From the foregoing it appears that the Court very definitely intended to make allowances for the natural appreciation in value of the property of the Appellant. However, the Court allowed Mr. Paddock the sum of Ten Thousand Dollars ($10,000.00) for the value of his property acquired prior to his marriage, but stated in its Findings that he had an investment of Ten Thousand Dollars ($10,000.00) prior to his marriage. This sum did not even come up to the amount that the evidence would show Mr. Paddock was worth at the time of his marriage, much less make any allowance for the increase in value of his property. (TR 129.)

In all fairness, the Court should have considered the natural increase in value of property in the Anchorage area and given the Appellant the benefit of this increase. The logic of this argument can be seen by speculating as to the results if the reverse had been followed. That is, to attempt to value the property acquired since marriage by the value of the property bought, at the time it was bought, and then adding these sums together. The result would be very small,

since the main piece of property which consists of the present location of the Paddock Paint and Furniture Store, cost Twenty Thousand Dollars ($20,000.00) (TR 130), and the home lot cost Eight Hundred Dollars ($800.00). (TR 131.) Thus, by using such an unrealistic approach, we get an unrealistic result. If the Court were going to award the Appellant the value of his property acquired prior to marriage, the Court should also take into consideration the increment in value due to the natural appreciation in value.

B. THAT THE OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND DECREE ARE BASED UPON THE THEORY OF PARTNERSHIP IN THE BUSINESS KNOWN AS PADDOCK'S PAINT AND FURNITURE STORE, WHEN IN TRUTH AND IN FACT, THERE WAS NO PARTNERSHIP AND NO PROOF OF PARTNERSHIP, THAT THE PROPERTY ALL BELONGED TO HAROLD D. PADDOCK BEFORE HE MARRIED THE PLAINTIFF, AND CONTINUED TO BELONG TO HIM AT ALL TIMES, AND THAT THE ORAL FINDING OF THE COURT THAT THERE WAS A PARTNERSHIP BETWEEN THE PARTIES IS NOT SUPPORTED BY ANY EVIDENCE; IT IS AGAINST THE CLEAR WEIGHT OF THE EVIDENCE, AND IS AGAINST THE LAWS OF THE TERRITORY OF ALASKA. (Point 3.)

That the Court seems to have treated this matter as a partnership accounting appears quite evident from the Court's statement at Page 103 of the transcript, as follows:

> "The Court. Mr. Kay, the Court will point out to you that the Court considers marriage a partnership and, therefore, based upon statements of Judge Dimond and Judge Folta and experience of this Court, it is, therefore, the Court's feeling

that any improvements to the contrary will be a waste of time."

This discussion continued on as follows (TR 103-104):

"Mr. Kay. Let me get the Court's thinking straight. The mere fact that the people are partners constitutes the wife a partner in business?

The Court. No, the mere fact they are married and in this case (47) particularly where they have worked together."

Earlier in the proceedings, Appellee's attorney took the position that the business of Appellant and Appellee was conducted as a partnership and that the parties were partners. At Page 67 of the transcript the Appellee's attorney inferred that it was a partnership while discussing the preliminary proceedings in this case in his opening statement.

"Mr. Davis. . . . I would like to point out to the Court, that under order of this Court, *although the parties have conducted that business as a partnership for many many years last past . . .*" (TR 67) (Emphasis supplied.)

Appellant's attorney objected to any attempt to show that the business of the parties to this action was a partnership (TR 68), but Appellee's attorney insisted on trying to show that it was. The transcript shows that the Appellee did not even know what a partnership was. On direct examination at Page 83 of the transcript the following took place:

"Q. All right, did you actually—Mrs. Paddock, did you and Mr. Paddock actually conduct this business over all these years as partners

Mr. Kay. I object as leading and calls for conclusion of (24) the witness.

The Court. Objection sustained.

Mr. Davis. As being leading or calling for conclusion?

The Court. Both. I am not sure that the witness knows what a partnership is.

Q. (By Mr. Davis.) Mrs. Paddock, do you know what a partnership is?

A. Well, I figure if two people have worked in business long enough—even if—like the income tax, it was written down as a partnership.

Q. Did you file, as a matter of fact, partnership income tax returns?

A. Yes."

It appears that the Appellee was not too well informed of the status of the business, for under cross-examination the following took place (TR 100):

"Q. Now, are you sure or aware of the difference between a joint tax return filed by husband and wife and a full partnership tax return, Mrs. Paddock?

A. I mean, Mr. Godchaux has all of those—I mean, it is right down there. I took it for granted it was a partnership.

Q. Well, then you don't know whether or not the firm actually filed partnership tax returns or not, do you?

A. Well, I believe they did.

Q. But do you know?

A. Well, no unless I look at it again. I can't say positively that they did."

In any event, there appears to be no evidence that a partnership existed between the parties to this action,

other than that the Appellant and Appellee were married. The Appellee even admitted that there was no oral or written partnership agreement of any kind at Page 101 of the transcript, as follows:

> "Q. In other words, then the answer is that you and Mr. Paddock have never had either a written or oral partnership agreement of any kind?
>
> A. No, that is right."

Despite the fact that there was no showing whatsoever that a partnership existed between the Appellant and the Appellee, the Court apparently divided the property of the parties upon a partnership basis, giving an equal interest to Appellant and Appellee after deducting the original investment by Appellant. The Court also found that the original investment of the Appellant in his business was Ten Thousand Dollars ($10,000.00). (TR 25.) As indicated in the previous argument, the figure here is not supported by the evidence.

Even if there had been a specific agreement between the Appellant and the Appellee, written or oral, there still could not have been a valid partnership relationship between the two, for the reason that a husband and wife cannot be partners to each other in Alaska. This follows the old common law rule which is set forth in 26 Am. Jur. at Page 853-854, as follows:

> "At common law, there can be no partnership between spouses, and a married woman cannot become a member of a partnership of which her husband is also a member, since the legal existence

> of the wife merges in that of the husband and they cannot contract with each other."

The foregoing is the common law rule, and in view of Section 2-1-2 ACLA (1949), the common law rule will have to be deemed to be the law of Alaska. Section 2-1-2 ACLA (1949) is quoted:

> "So much of the common law as is applicable and not inconsistent with the Constitution of the United States or with any law passed or to be passed by Congress or the Legislature of Alaska is adopted and declared to be law in the Territory of Alaska."

It is true that we have Married Women's Property Acts in Alaska, with Section 21-2-10 ACLA (1949) giving a wife power to contract or incur liabilities, as follows:

> "Contracts may be made by a wife, and liabilities incurred, and the same enforced by or against her to the same extent and in the same manner as if she were unmarried."

It should be noted at this time that this particular Section is identical to Section 2997 of Hill's Annotated Laws of Oregon, 1892, and it was under an interpretation of this particular Section that the Washington State Supreme Court held that it was impossible for a husband and wife, in Alaska, to enter into a partnership relationship. In this case, *Elliott v. Hawley, et ux.*, 76 P. 93, the Court also construed several of the Married Women's Property Acts which were applicable to Alaska at that time. These were Sections of Hill's Annotated Laws of Oregon.

In the case of *In Re Dixon et al.,* 18 Fed. 2d 961, the Court, in construing certain Married Women's Property Acts, stated:

> "... Under the Michigan statute, it has been held that a married woman may become a member of a partnership with others than her husband (Vail v. Winterstein, 94 Mich. 230, 53 N.W. 932, 18 L.R.A. 515, 34 Am. St. Rep. 334), but that she cannot form a partnership with her husband which will render her liable for the payment of partnership obligations (Artman v. Ferguson, 73 Mich. 146, 40 N.W. 907, 2 L.R.A. 343, 16 Am. St. Rep. 572). In the case of Artman v. Ferguson, it is said:
>
> 'It is the purpose of these statutes to secure to a married woman the right to acquire and hold property separate from her husband, and free from his influence and control, and if she might enter into a business partnership with her husband it would subject her property to his control in a manner wholly inconsistent with the separation which it is the purpose of the statute to secure, and might subject her to an indefinite liability for his engagements. A contract of partnership with her husband is not included within the power granted by our statute to married women. This doctrine was laid down in Bassett v. Shepardson, 52 Mich. 3, 17 N.W. 217, and we see no reason for departing from it. . . ."

Another jurisdiction that has refused to permit wives to become partners of their husbands is that of Maine. In *Haggett v. Hurley, et ux.,* 40 Atlantic 561, the following headnote sets forth the rule:

> "The common law disabilities of a married woman have not been so far removed by statute as to empower her to form a business partnership with her husband."

Michigan, too, follows the old common law rule that husband and wife could not enter into a partnership and in *Dombrowski v. Gorecki,* 289 N.W. 293, the Court follows the same reasoning as in *Dixon et al.,* 18 Fed. 2d 961 (supra).

The question has also been discussed by the Massachusetts Court in *Edgerly v. Equitable Life Assurance Society,* 191 N.E. 415 and the opinion reported at Page 417 could well be applied to the Alaska Statutes on partnership and Married Women's Property Acts. The statement of the Court is quoted:

> "There is nothing in the uniform partnership statute as adopted in this Commonwealth (St. 1922, c. 486, see now G. L. (Ter. Ed.) c. 108A), which changed the previously existing law with respect to the incapacity of a married woman to make a contract a partnership with her husband. That statute provides in part that a 'partnership is an association of two or more persons.' G.L. (Ter. Ed.) c. 108A, Sec. 6. But it neither expressly nor impliedly confers capacity to make such a contract upon an individual who, by the law governing capacity, is incapable, because of infancy, coverture, or any other reason, from making a contract. The statute does not purport to deal with capacity to contract and the provision therein that it shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.'

> G.L. (Ter. Ed) c. 108A, #4(4) does not require uniformity in law outside its scope and affecting it only incidentally. Though apparently neither the word 'persons' nor anything else in the uniform partnership statute by its own force precludes a married woman from making a contract of partnership with her husband, if this was permitted by other provisions of law, that statute must be applied in harmony with the existing provisions of law which render her incapable of so doing."

Thus, since Alaska has also adopted the uniform partnership act, (Section 28-1-1 ACLA 1949), the same reasoning as in the foregoing paragraph should be applied in this case. That is, the uniform partnership act does not change the previously existing law with respect to the incapacity of a married woman to enter into a partnership with her husband, and there is nothing in the Alaskan Married Women's Property Acts which would tend to change the law on this particular point, and it has been pointed out above in *Elliott v. Hawley, et ux.,* 76 Pac. 93, that the present section removing the wife's incapacity to contract, did not permit her to enter into a partnership relationship with her husband.

The Supreme Court of the State of Washington has also held that married women's property act, which permitted the wife to maintain an action against her husband for the possession of property and which permitted her to contract the same as if she were unmarried, did not allow her to enter into a contract of partnership with the husband. See *Board of Trade of*

City of Seattle, et al. v. Hayden, 30 Pac. 87; *Didier, et al. v. Pardue and Pardue,* 144 So. 762.

In *Fuller and Fuller Company v. McHenry,* 53 N.W. 896, Wis. 1892, the statute involved gave the wife the right to make contracts in regard to her separate estate, and the wife in this particular case attempted to form a partnership with her husband. At Page 898 the Court stated:

> ". . . Had it been shown, however, that Mrs. Hanson had a separate estate, we think that the partnership agreement between her and her husband (if any, for there is little more than a scintilla of evidence of one) must be regarded as void, and that the business in question was the sole business of her husband, and the Plaintiff's claim is his sole and individual debt. The purpose and policy of the statute concerning the rights of married women, in our judgment, forbid the formation of a continuing business engagement between husband and wife, which shall produce a community of interest, liability, and profit, in which the husband would have, as partner, a right of control and management of the separate estate of the wife, so that he could sell and convert it into money from time to time, draw the firm moneys from the bank, and collect notes and bills receivable and dispose of the proceeds, in the payment of his debts or otherwise, without her knowledge or consent. The making of such an engagement by the wife might be, if put in execution, a conversion of her separate estate into that of her husband. Certainly, it is easy to understand that, with his influence and control as husband, such result would be almost inevitable. The principal

> purpose of the statute is to give the wife the power and rights of a feme sole as to her separate property, free 'from the disposal of her husband' and 'not liable to his debts' . . ."

Another case on the same point is *Gilkerson-Sloss Commission Company v. Salinger,* 19 S.W. 747, wherein the Court stated as follows at Page 748:

> "In view of the legal unity and identity of husband and wife at common law, and the wife's incapacity to sue the husband at law, and the rulings of our court upon the incapacity of the wife to contract with her husband, we are of the opinion that the wife, under our statute, cannot form a partnership with her husband. As the credit in this case was given to the firm of which she could not be a member, and as she is sued as surviving partner of that firm, there can be no recovery against her in this action."

The Court here also had to construe a Married Women's Property statute, namely Section 4625 of Mansfield's Digest.

In view of the foregoing, it seems abundantly clear that a wife cannot be a partner with her husband in Alaska, and that any distribution of the property of the Appellant herein, based upon a theory of partnership between him and the Appellee is erroneous.

C. THAT THE COURT ERRED FURTHER IN THAT THE FINDINGS OF FACT AND CONCLUSIONS OF LAW CONFLICT WITH THE OPINION FILED OCTOBER 8, 1954, AND THEREFORE THE FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE EVIDENTLY SIGNED BY INADVERTENCE AND MISTAKE, AND IT WAS ERROR ON THE PART OF THE TRIAL COURT TO REFUSE TO SET THEM ASIDE AND CORRECT THEM. (Point 4.)

In the Opinion dated October 8, 1954, the Court stated (TR 21):

> "The appraisers are hereby instructed to first deduct from the plaintiff's interest in and to said business the sum of $30,000.00 which is the amount found to be that interest the defendant had in and to said business before he married the plaintiff and the value of Lot 3, of Block 108, of the Original Townsite (supra)."

The foregoing paragraph from the Opinion is inconsistent with the Court's paragraphs 2 and 3 of the Conclusions of Law (TR 28). This inconsistency hasn't been set aside or disposed of by motions or orders, but is still continuing to be in effect as if no such inconsistency existed. If the referred to paragraph in the Opinion were to be given effect, a much more equitable result would follow. The difference in results is clearly set forth by Mr. W. P. Odom, accountant, in his report filed February 21, 1955 at Page 50 of the transcript.

Appellant submits that the Opinion should have been followed and that it was error for the Court to enter Findings of Fact and Conclusions of Law and a Decree that was inconsistent with the Opinion.

D. THE COURT ERRED IN FINDING IN ITS OPINION ON PAGE 2 THEREOF, THAT BOTH PLAINTIFF AND DEFENDANT DEVOTED THEIR FULL TIME IN THE DEVELOPMENT OF THE BUSINESS, BECAUSE THERE IS NO SUBSTANTIAL EVIDENCE TO THAT EFFECT, AND THERE IS PLENTY OF COMPETENT EVIDENCE AGAINST SUCH A FINDING, AND THAT SUCH FINDING IS CONTRARY TO THE GREATER WEIGHT OF THE EVIDENCE, AND NOT SUPPORTED BY ANY EVIDENCE.

THAT THE COURT FURTHER ERRED IN FINDING THAT EACH PARTY IS ENTITLED TO ONE-HALF OF THE REAL AND PERSONAL PROPERTY, BECAUSE THE FINDING IS CONTRARY TO LAW, CONTRARY TO THE EVIDENCE, CONTRARY TO EQUITY AND JUSTICE, AND AGAINST THE GREATER WEIGHT OF THE EVIDENCE. (Points 5 and 6.)

The evidence in this case is undisputed that the Appellee had two very young children of her own at the time that she married the Appellant. These children were the Appellee's by a former marriage, and although the Appellant provided a home for the children, he had never adopted the children, and therefore was never legally responsible for them. (TR 141.) The evidence even shows that the Appellant hired housekeepers to help take care of the children while the children were young, (TR 140) and obviously the mother of the children would have to spend some time caring for them so that she could not have spent as much time working in the business as did the Appellant. It should also be pointed out that the contributions of the Appellee to the business of the Appellant were minor and unnecessary and, at the most, could be valued no more than the services of any other employee. In fact, had the Appellee stayed at home more and taken care of her two young children this divorce might never have occurred. The following will

point out some of the difficulties that have resulted from the Appellee's failure to stay home and take care of her children. See Tr. 139-140:

"Q. Now, Mr. Paddock, how did it happen that a mother with two relatively small children was spending time down at the store rather than being home taking care of the house?

A. Well, didn't like to stay home, maybe. I don't know.

Q. Just like to take part in the business, is that the idea?

A. Yes, I'd say so.

Q. Was that particularly at your request that she came down and participated in the business as she has?

A. No.

Q. Have you ever suggested that you preferred, that she might put her time to better advantage to take care of the home than the business?

A. Yes.

Q. As a matter of fact, that has been one of the sources of irritation that led up to this incompatibility, has it not?

A. That is right.

Q. Do you feel that Mrs. Paddock has contributed, let's put it this way—strike that—in what proportion, being fair to both of you, to the best of your ability, in view of the situation, in what proportion do you honestly feel that Mrs. Paddock has contributed to the rather pleasant financial position in which you find yourself today? I mean, by participating in the business what do you feel she has contributed to it?

A. Not any more than the salary of anybody else."

On the same page, namely 140, of the transcript, the following indicates one of the results of Mrs. Paddock's insisting on working at the store:

"Mr. Davis. I am sorry, Mr. Paddock, I am not understanding what you are saying.

A. I said in the stages of when the kids were younger that we hired housekeepers to take care of the kids, to come in during the day and Mrs. Paddock took care of them at night."

It should also be pointed out that the duties of Mrs. Paddock in the paint store were minor and were such as could have been taken care of by any other employee. The following testimony will bear this out (TR 134):

"Q. What was the nature of her duties at that time, Mr. Paddock?

A. Answering the telephone mainly and taking appointments for contract work and sell paints, mark prices, etc. or show wallpaper.

Q. Just a general job of employee in a paint store or small store, is that correct?

A. That is right.

Q. Now, was there any difference—change in those duties after your marriage?

A. No."

It should also be noted that when Mrs. Paddock went to work for the Appellant she did so for $40.00 a month. Since she continued to do the same type of work after she got married, it seems reasonable to assume that the value of her services would still be approximately the same. This $40.00 a month which amounted to $480.00 a year, the amount that Mrs.

Paddock first got when going to work as an employee, is a far cry from the $16,000.00 that she drew in 1953 out of Appellant's business. (TR 93.)

In awarding each party one-half of the real and personal property, the Court does not appear to have made an attempt to distinguish separate property from that of the jointly owned property. The difficulty that results from the failure of the Court to consider the separate property of the Appellant is due to the fact that such separate property would increase in value with the general economic changes in the locality. Here, however, the Court has placed an arbitrary value upon the property of the Appellant and no allowance made for any appreciation in value. The lower Court should have separated the property which was separate property of the Appellant in its Findings of Fact and Conclusions of Law and Decree and if the separate property were then awarded to the Appellant, he would, of course, also get the natural increase due to appreciation in value.

E. THE COURT ERRED FURTHER IN FINDING THAT THE DEFENDANT'S INVESTMENT IN THE BUSINESS PRIOR TO THE TIME PLAINTIFF MARRIED HIM WAS $10,000.00, WHEN THE UNDISPUTED EVIDENCE SHOWED A GREATER AMOUNT, AND THIS FINDING SHOULD HAVE BEEN TO THE EFFECT THAT THE DEFENDANT OWNED LOT TWO (2) AND THE EAST ONE FOOT OF LOT THREE (3) IN BLOCK 39, IN THE ORIGINAL TOWNSITE OF ANCHORAGE, ALASKA, AND ALSO OWNED THE PROPERTY ACROSS THE STREET THEREFROM, KNOWN AS THE SUNSHINE MARKET, PRIOR TO HIS MARRIAGE TO THE PLAINTIFF, AS ALL OF THE EVIDENCE SHOWS THAT FACT TO BE TRUE.

THE COURT ERRED IN NOT GIVING THIS REAL PROPERTY LAST ABOVE DESCRIBED TO THE DEFENDANT FREE AND CLEAR OF ANY CLAIM OF THE PLAINTIFF. (Points 7 and 8.)

There is no dispute in this case that the Appellant owned the going paint store in the City of Anchorage, including the property upon which the buildings were located, at the time that the Appellee first went to work for him, and that the Appellant also owned this at the time that the Appellee married the Appellant. The estimate of the value of the Appellant's business prior to the time that the Appellee married him was given at from $15,000.00 to $20,000.00. (TR 129.) And although there is no dispute that the Appellee claimed an interest in the property of the Appellant prior to the time that she married him, the Court refused to award this separate property to the defendant, the Appellant herein. The failure of the Court to award to the Appellant the property that was his prior to the time that the Appellee married him and the failure of the Court to allow the Appellant more than $10,000.00 for the value of his business which was owned and operated prior to the time that the Appellee came

into the picture was erroneous, and was such an abuse of discretion as to constitute reversible error.

The discretion of the Court in making property awards is not arbitrary, and the rule is fairly well stated in *Stewart v. Stewart,* 242 Pac. 947, where the opinion at Page 949 is quoted as follows:

> "It is now the settled law and practice of this Court that, while a large discretion is vested in the Trial Courts in applying the provisions of the foregoing statute and in making distribution of property, yet such discretion is not an arbitrary one but is a sound legal discretion, and is subject to a review by this Court. . . ."

The foregoing rule is supported by *Swanda v. Swanda,* 232 Pac. 62, as expressed by the following headnote:

> "Where, in an action by a wife against her husband to obtain a divorce and alimony, the Court finds that the wife is not entitled to a divorce or alimony, and both are refused, the Court is authorized, under Section 505, Compiled Laws 1921, to make such order as may be proper for the equitable division of the property then owned by them, taking into consideration the time and manner of its acquisition."

The rule is also fairly clearly set forth in *Shaw v. Shaw,* 133 Atlantic 248, wherein the Court stated at page 249:

> "In fixing the amount of the award, the Court is vested with a wide, but judicial discretion. If that discretion is neither withheld or abused, the decision, on general principles, is not subject to a

review. But if the Trial Court declines to consider a material fact, well proved, or makes what is manifestly an unjust award, this Court will correct the error. That facts covered by the requests referred to were material and should have been found. The refusal of the Court to comply with the requests amounted to a ruling that they were not material, which would be error."

Another case holding that the division of property should be equitable is *Tackett v. Tackett,* 129 S.W. 2d 574, which held in part:

"Award of trial Court allowing divorced wife all of personalty in satisfaction of her alimony claim was erroneous, since trial court should have made an equitable division of personalty, between husband and wife, with not more than one-half being set aside for use of wife."

For holding wherein the Appellate Court reversed the lower Court because of the lower Court's abuse of discretion in the property settlement, see *Van Horn v. Van Horn,* 119 Pac. 2d 825, which essentially held as follows:

"Irrespective as to whether divorce is granted to husband or to wife, the wife is entitled to a fair 'equitable division' of the property acquired during marriage, which does not necessarily mean an equal division of the property."

It thus appears that a fair and equitable division of the property is a majority rule in divorce actions. However, this raises the question of what property is involved in the fair and equitable division. The Ap-

pellant herein submits that a fair and equitable division of property of himself and the Appellee does not include the separate property of the parties which was separate at the time of the marriage. For a case setting forth the rule quite clearly, see *Colvin v. Colvin,* 81 Pac. 2d 305, wherein the Court stated at Page 306:

> ". . . None of the property was acquired by the joint industry of husband and wife. We do not deem it of any value to discuss the various allegations and claims as to the difference in the financial status. We think this matter has been thoroughly covered by the Court in Hughes v. Hughes, 131 Okla. 33, 367 Pac. 620, in which this Court said: 'Where a divorce is granted the husband because of the fault of the wife, the Court should make a fair and equitable division of the property acquired by the joint industry of the parties during marriage, but in such case no division should be made of the separate property of the husband acquired prior to the marriage.' See, also, Finnel v. Finnel, 113 Okla. 164, 204 Pac. 62, and Stocker v. Stocker, 172 Okla. 64, 47 Pac. 2nd 107."

The Appellant submits that the equitable division of the property would have awarded the property to him which he owned prior to the time that he married the Appellee, or in the alternative, to award an amount that would be equal to his interest in the business owned prior to the time of his marriage, plus the increase in value which was due to the natural increase of property values in the area over the years. The actual distribution ordered by the Court was an abuse of discretion and erroneous.

F. THE COURT FURTHER ERRED IN ITS OPINION FILED OCTOBER 8, 1954, GIVING THE PLAINTIFF $700.00 A MONTH SALARY FOR WORKING IN THE FURNITURE STORE FOR THE ENTIRE YEAR OF 1953, WHEN THE EVIDENCE SHOWED SHE DID NOT WORK THERE DURING THAT PERIOD AT ANY TIME. (Point 9.)

At Page 21 of the transcript the Court found that both plaintiff and defendant were entitled to a monthly wage of $700.00 for the entire year of 1953 and that the plaintiff and defendant should be credited or debited such a sum in accordance with their drawings for that year, etc.

Such a finding is obviously erroneous, since there is no evidence to show that the Appellee worked in the store for the year of 1953, and could, at most, be entitled only to support money and not to salary for working in the store. The Appellee alleged in her complaint that she and the Appellant were separated in the month of October, 1952, and that they have been separated since that date. And, in any event, if the Appellee were working in the store for the full year of 1953, part of the work would be in direct violation of the order of the lower Court, for the reason that an Order to Show Cause and a Temporary Restraining Order was filed on November 20, 1953, which enjoined the Appellee from entering on or about the premises of the Appellant's business. Mrs. Paddock's claims would have to be something other than for salary for working in the furniture store.

G. THE COURT ERRED IN THAT, AFTER IT ORDERED THREE APPRAISERS TO BE CHOSEN AND A DECISION AND APPRAISAL REACHED, WHICH DECISION AND APPRAISAL WOULD BE FINAL, AND BEFORE THIS DECISION WAS REACHED, THE COURT SIGNED THE PURPORTED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND DECREE, OVER THE OBJECTIONS OF THE DEFENDANT. (Point 10.)

In the Court's Opinion (TR 20) the Court stated:

> ". . . Such interest of the plaintiff shall be determined by three appraisers, one appraiser to be appointed by the plaintiff and one by defendant, and these two in turn to appoint a third and the decision reached by any two of the three appraisers shall be final . . ."

This Opinion was filed on October 8, 1954. However, it does not appear that any appraisal was filed by such appraisers before the filing of the Findings of Fact and Conclusions of Law and Decree by the Court on December 22, 1954. It is true that reports were filed, but after the Court had already signed the Decree. This Decree made the determination that the Appellant was only to get $10,000.00 credit for the value of his business prior to the time that he married the Appellee, and thus the appraisers never had a chance to appraise the value of the business before the marriage.

It should also be pointed out that the Court under Rule 53 of the Federal Rules of Civil Procedure referred the accounting to a Master. (TR 64, 72.) But it does not appear that the Master gave a report as to the value of Appellant's property prior to the time of his marriage at any time before the Court signed the Findings of Fact and Conclusions of Law and Decree.

H. THE COURT FURTHER ERRED IN ITS FINDING THAT THE PLAINTIFF IS ENTITLED TO RECEIVE FROM THE DEFENDANT $500.00 PER MONTH FOR TEMPORARY SUPPORT FROM JANUARY 1, 1954, UNTIL OCTOBER 31, 1954, THIS BEING INEQUITABLE AND UNFAIR, DUE TO THE OTHER FINDINGS IN THE OPINION AND THE TESTIMONY BEFORE THE COURT. (Point 11.)

The Appellant was ordered to pay the sum of $500.00 per month from January 1, 1954 to October 31, 1954 in the Conclusions of Law and by the Decree. However, the Court ordered this payment even after the Court had already decided to give the Appellee half of the property with the exception of the $10,000.00 to the Appellant. Undoubtedly the Court took into consideration the fact that the two daughters of the Appellee were attending school in the States which required certain sums for their tuition, board, etc. in making the awards. The Court even ordered certain payments made to cover tuition and board for the girls. However, the Appellant never adopted these children and therefore was not legally responsible for any of their education, maintenance and support. (TR 173.)

Another point that the lower Court apparently ignored in ordering the Appellant to make payments of $500.00 per month support was that if the parties were separated through the fault of the wife the Appellant was not duty bound to pay for her support. The rule is well stated in 26 Am. Jur. at Page 939, Sec. 340 of Husband and Wife, as follows:

> "No duty of a husband to support his wife exists, as a general rule, where they are living apart through her fault. Nor does such duty exist, al-

> though a husband has not requested his wife to live with him, where her unyielding attitude is and has been that she will not do so, where he abandons her because of her adultery, or where she is guilty both of adultery and of abandoning him. The duty of the husband to support the wife ceases upon her abandonment of him without justification; . . ."

For cases in support of this proposition, see *Maschauer v. Downs,* 53 App. D.C. 142, 289 Fed. 540, 32 ALR 1461; *Mirizio v. Mirizio,* 242 N.Y. 74, 150 N.E. 605, 44 ALR 714; *Richardson v. Stuesser,* 125 Wis. 66, 103 N.W. 261.

I. THE COURT ERRED IN MAKING FINDING OF FACT NO. 7, FOR THE REASON THAT SAME IS INEQUITABLE, NOT SUPPORTED BY COMPETENT EVIDENCE, AND IS BASED UPON THE THEORY OF PARTNERSHIP EXISTING BETWEEN THE PLAINTIFF AND THE DEFENDANT AND IS CONTRARY TO GOOD CONSCIENCE, LAW AND EQUITY. (Point 12.)

The Finding of Fact No. 7 is clearly in error, which is probably due to the fact that the Court was assuming that a partnership existed between the parties to this action. There has been no attempt on the part of the Appellee to show that all of the property listed in the Finding of Fact No. 7 was acquired by the parties after the marriage, but on the contrary the Appellee admits that the Appellant owned certain property in the City of Anchorage at the time that they were married. The admissions on this particular point can be found throughout the record and the Appellant's ownership of certain real estate has never

been denied. This particular Finding again tends to show the inequitable determination of the property disposition of the parties to this action.

J. THE COURT ERRED IN MAKING FINDING OF FACT 8, FOR THE REASON THAT THE SAME IS AGAINST THE EVIDENCE IN THE CASE, IS INEQUITABLE, UNFAIR AND CLEARLY AGAINST THE LAW IN THIS CASE.

THE COURT ERRED IN MAKING CONCLUSION OF LAW NO. 5 FOR THE REASON IT IS CONTRARY TO LAW, CONTRARY TO EQUITY AND GOOD CONSCIENCE.

THE COURT ERRED IN MAKING CONCLUSION OF LAW NO. 6, ON THE LAST PAGE THEREOF, FOR THE REASON THRE IS NO EVIDENCE TO SUPPORT SUCH A CONCLUSION OF LAW, NO FINDING OF FACT BASED UPON ANY COMPETENT EVIDENCE TO GIVE THE COURT ANY REASON TO MAKE SUCH A CONCLUSION OF LAW.

THE COURT ERRED IN MAKING CONCLUSION OF LAW FOUND IN PARAGRAPH 3 OF THE DECREE; THAT THE SAME IS ERRONEOUS, IS UNSUPPORTED BY THE EVIDENCE, IS AGAINST THE LAWS OF THE TERRITORY OF ALASKA, AND CONTRARY TO ALL EQUITY IN THE MATTER.

THE COURT ERRED IN RENDERING AND SIGNING A DECREE BASED UPON THE ERRONEOUS FINDINGS OF FACT AND CONCLUSIONS OF LAW. (Points 13, 14, 15, 16 and 17.)

The above points have been discussed, at least in part, earlier in this brief. We need only touch upon these points briefly at this time.

Finding of Fact No. 8 is in conflict with the Opinion of the Court filed earlier in this action. It is this Finding which also determines the amount to be allowed to Appellant herein for his business owned prior to his marriage, which, as pointed out above, is so inequitable as to constitute an abuse of discretion and reversible error.

Conclusion of Law No. 5 concerns the split of the property equally between the parties and, as pointed out above, results in the inequity in this case.

The remaining points appear to be covered, in part, above.

VI.

CONCLUSION.

In conclusion we must say that the gross inequities of the lower Court decision have resulted from misunderstandings and errors on the part of the trial Court, and the inequities are of such a nature as to require the correction of same by this Court. We sincerely request that the lower Court decision be at least modified, if not set aside.

Dated, May 28, 1956.

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